Supreme Court of the United States

OCTOBER TERM, 1944

THE NORTH SHORE CORPORATION,
a corporation,

Petitioner,

vs.

ISADORE BARNETT, J. F. BOOTH, R. BRAZLE, L. L. GARVIN, AMOS HARRIS, J. A. LANG, N. LANG, JR., M. E. NOWLIN, G. A. PEREIRA, R. L. SIMMONS, N. W. SMITH, FRANK SMITH and W. R. STEWART,

Respondents.

PETITION FOR WRIT OF CERTIORARI

The North Shore Corporation, a corporation organized and existing under the laws of the State of Florida, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit in the above case, entered June 9, 1944, petition for rehearing upon which was denied July 11, 1944, 143 F. (2d) ..... A certified transcript of the record in the case, including the proceedings and opinion in that court, is filed herewith, together with ten copies of the record as printed below.

STATEMENT OF THE MATTER INVOLVED

(a) History of the Case.

Respondents brought suit in the United States District Court in and for the Southern District of Florida, seeking recovery from petitioner and another corporation, later

dismissed from the action, of divers amounts alleged to be due them under the Fair Labor Standards Act of 1938 (52 Stat. 1060, U. S. Code, Title 29, Sec. 201-219) for unpaid minimum wages, overtime compensation, additional equal amounts as liquidated damages, and attorneys' fees (R. 1-10).

To the complaint as originally framed, petitioner addressed a Motion to Dismiss, which was granted by the District Court. 43 F. Supp. 445. Certain of the respondents appealed, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 128 F. (2d) 450. These respondents applied to this court for certiorari, which was granted. 317 U. S. 606. This court reversed the decision of the Circuit Court of Appeals and of the District Court and remanded the cause for trial. 318 U. S. 125.

On remand, the cause was tried before the District Court, without a jury (R. 72-320), being consolidated for the purpose of trial with the case of *Scott, et al,* vs. *The North Shore Corporation* (R. 72). This trial resulted in a judgment adverse to the petitioner (R. 321-335). 52 F. Supp. 503. Respondents recovered $20,949.78 and costs (R. 334). Petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed (R. 351 and 361). 143 F. (2d) .... Judge Sibley dissented (R. 357-361). 143 F. (2d) ...., ... Petitioner filed a petition for rehearing (R. 363-368), which was denied (R. 369). Petitioner seeks certiorari to review the last mentioned decisions of the Circuit Court of Appeals.

(b) Statement of the Case.

Upon the previous appearance of this case in this court, the matter involved was the sufficiency of the statement of the Respondents' case, contained in their complaint. The matter now involved is the sufficiency of the evidence to

support the judgment of the District Court, as affirmed by the Circuit Court of Appeals.

The relevant material facts disclosed by the record are these:—

Petitioner owned and operated a country toll road, lying wholly within Duval County, Florida, which connected with U. S. Highway No. 17, a short distance north of the city limits of Jacksonville, Florida. From that intersection, the toll road extended easterly a distance of about seventeen miles, generally paralleling the north shore of the St. Johns River, to a point near the western shore of Fort George Inlet, where it came to a dead end. It connected with a County Road serving only Fort George Island, a community of less than 100 persons, and afforded the only overland communication route between that community and the outside world. It crossed, among other waterways, three navigable streams: Cedar Creek, Clapboard Creek and Sisters Creek, the latter being a part of the Intracoastal Waterway. Construction of the road was completed in 1928, and it was operated as a toll road through 1943. Tolls were collected by authority of an Act of the Florida Legislature, granting a franchise therefor, upon condition that the road "be open for traffic at any and all times and maintained in a condition safe and suitable for travel. . ." The traffic over the road was light, the average weekly number of vehicles being under 130, and was more than 99% intrastate.

The trial court found that every merchant with a place of business on the road had testified and that only one had received interstate shipments of goods, and he only three; that from 1938 to 1942, inclusive, not in excess of fourteen movements of goods in interstate commerce took place over the road. Evidence as to transits over the road of cars bearing out-of-Florida licenses was termed by the court

"extremely unsatisfactory", except for a short period immediately preceding the trial, during which the "overwhelming majority" of the motor vehicles traversing the road bore Florida licenses. The Court's ultimate holding was based upon this finding:

> "However, it is clear from the evidence in the case that the toll road was at all times open to interstate traffic of every kind and character on the same terms as intrastate traffic moved over the road. It appears from the evidence . . . that the interstate use of the road was neither occasional nor accidental. The evidence establishes and . . . defendant admits that the toll road is used in interstate commerce. The court makes no specific finding that such use was 'substantial', nor does the court make any finding that such use was extensive as the court has held that jurisdiction does not depend upon such use."

More specifically, as to the interstate transits of individuals over the road: The evidence established in pre-war years fewer than 102 transits annually to the two "exclusive" social clubs on Fort George Island and not more than 29 transits annually of fishermen to the fishing camps scattered along the road. Since the war began, the clubs have closed down completely, and interstate fishermen have virtually discontinued their sport outside their own waters. The only additional evidence as to the commerce over the road is embodied in the finding that the United States mail is delivered and collected once a day six days a week over the full length of the road.

As to their duties, the respondents fell into two groups: one group repaired and maintained the surface of the toll road and the decking of the bridges, which were a part of the road; the other group consisted of those engaged in collecting tolls from vehicles traversing the toll road.

No question exists upon the record as to the amount of the award in favor of the several respondents, if the ultimate determination be that they are entitled to payment under the Fair Labor Standards Act.

Mentioned in the record, both in the Trial Court's opinion and in that of the Circuit Court of Appeals, is a telephone line, on which the respondents worked. In the judgment, recovery is had up to and inclusive of June 3, 1943. As in the case of the toll road, the classification of the work done on the telephone lines falls into two groups. The road repair crew occasionally, up to October 1, 1941, did some repair work on the telephone line. The toll collectors operated the telephone line as switchboard operators, making connections and putting calls through. As was pointed out by Judge Sibley, "the telephone line is a mere make-weight". The toll takers, as small switchboard operators, were excluded from the coverage of the Act under Section 13 (a) (11). If, therefore, they are entitled to recover, it is because other work done by them, namely, toll-taking, was within the coverage of the Act. Since the road maintenance crew did no work on the line subsequent to October 1, 1941, after which date all maintenance work was by others not here involved, the judgment, as to them, could not possibly be supported because of the work done on the telephone line. They, also, therefore, must be entitled to recover, if at all, on account of other work done by them which was within the coverage of the Fair Labor Standards Act. For those reasons a description of the telephone line and of the work done upon it has no proper place in a summary statement of the matter involved.

Both the Trial Court and the Circuit Court of Appeals were of the opinion that the decision of this court previously rendered in this cause, under the style *Overstreet, and others,* vs. *The North Shore Corporation,* 318 U. S. 125,

was controlling, notwithstanding the complaint there held sufficient alleged that there was "extensive" interstate commerce over the road, and that this court's opinion twice described the interstate commerce involved as being "extensive".

In the Trial Court, the defensive position of petitioner was that the interstate traffic, to which the respondents were, by this court, held to be so closely related as to be a part thereof, was not substantial within the meaning of this Court's decision in the Jacksonville Paper Co. case, infra, and, furthermore, was of so small a quantity as to be within the principle of "de minimis non curat lex".

JURISDICTIONAL STATEMENT

The jurisdiction of this court is invoked under U. S. Code, Title 28, Section 347 (a).

THE QUESTIONS PRESENTED

1. An employer owned and operated a dead end country toll road lying wholly within Duval County, Florida. No substantial amount of interstate commerce traversed the road, there having been a maximum of fourteen movements of goods in interstate commerce over the road in five years and a maximum number of interstate transits by individuals over the road in any one year of 131 persons. The total traffic over the road, in the years given, was as follows:

1940	43,424
1941	56,384
1942	41,381

The percentage of traffic represented by the interstate traffic:

1940	0.302-%
1941	0.233-%
1942	0.317-%

Were employees who maintained the road and who collected tolls from the users thereof "engaged in commerce" within the meaning of the Fair Labor Standards Act?

2. A private employer owned and operated a dead end country toll road lying wholly within Duval County, Florida. Some interstate commerce, not exceeding fourteen movements of goods, once passed over the road. Seasonally some individual interstate transits took place over the road. The average weekly total of local traffic over the road was approximately 1,000 vehicles. Under the authority "to regulate commerce among the several states", once some interstate traffic has passed over such road, and because the road must continually be open to all commerce, does Congress thereafter continuously have the power to regulate the method of operation of such road, including the fixing of minimum wages and maximum hours of employment for employees maintaining and operating the road?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The Circuit Court of Appeals has decided an important question of Federal Law, which has not been, but should be, settled by this court.

When the instant case was previously submitted to this court *(Overstreet, et al,* vs. *The North Shore Corporation,* 318 U. S. 125), some of the respondents being then the petitioners, it was claimed that the important question of Federal Law which had not been, but which should be, settled by this court, was:

> "Whether the Fair Labor Standards Act extends coverage to persons employed to maintain and repair roads and highway bridges *extensively* used in interstate *transportation of passengers and freight,* to

those engaged in collecting tolls on such roads, and to those engaged in operating drawbridges over navigable streams which form part of the highway."

At this stage of the proceedings those engaged in operating drawbridges over navigable streams have been eliminated from consideration (R. 359). A substantial amount of interstate commerce flowed under the drawbridge operated by Overstreet and, in view of the language of this court in the opinion above mentioned, there remained no question but what Overstreet was "engaged in commerce" and he was therefore paid under the Act. The only categories of workers left are those who maintained and repaired the road and those who engaged in collecting tolls on the road. There was no road, when the facts were in, such as was described to this court by respondents when they were petitioners for certiorari, viz: A road "extensively used in interstate transportation of passengers and freight".

The evidence being in, it is revealed that the road was used not more than fourteen times in five years for the transportation of freight and, so far as the record reveals, never for the commercial transportation of passengers. However, a maximum of 131 annual interstate transits of sportsmen on fishing trips and of patrons or members of two "exclusive" social clubs, to attend the clubs, is established.

The important question of Federal Law which is not decided is whether persons employed to maintain and repair roads and bridges, and to collect tolls for the use thereof, are within the coverage of the Fair Labor Standards Act, where the interstate use of such roads and bridges is insubstantial and inconsequential.

This question is one of great public importance, because it affects every street, road and sidewalk in the smallest villages and hamlets throughout the Nation to the extent

that any worker on any thereof, if this decision stands, is "engaged in commerce". Not only are public highways involved, but also are involved thousands of private ways like those posted in so many New England communities. In fact, the decision is so broad as to involve any person laboring upon the walkway leading to the door of almost every citizen in the United States. Employers are entitled to know whether they must make provision to meet the financial burdens created by the Fair Labor Standards Act when the labor of their employees has to do, even in the most remote regions, with a passageway over which some movement of interstate commerce may have passed or over which some interstate transit may have taken place, even though such interstate use of the passageway may to the employer be unknown.

The public at large, whether employer or employee, whether municipality calling for bids for the repair of its public streets, or land owner employing a contractor to repair a passageway leading to his land, all, are entitled to know whether labor upon remote highways, seldom touched by interstate travel or commerce, must be compensated under and governed by the Fair Labor Standards Act.

Involved also is the question whether an employee whose labor is 1/100ths interstate, and 99/100ths intrastate is engaged in commerce within the meaning of the Fair Labor Standards Act; whether being "engaged in commerce" within the Fair Labor Standards Act means something more than a minimal of engagement therein, to-wit, whether there must be substantial engagement in commerce by an employee before the Act will be deemed applicable to him. In this connection Judge Sibley, in his dissent below, said:

> "It is perfectly clear that both the toll-takers, who dealt directly with the traffic on the road, and the maintenance men who did not, but whose work was so near

that traffic as to be practically a part of it, were engaged principally in intrastate commerce, with a small admixture of interstate commerce. Is that admixture, not exactly determined or determinable, sufficient to make these men 'engaged in interstate commerce' under the Act? No one contends that an employee must be *wholly* so engaged. No one hitherto has contended that a very slight admixture of interstate commerce will suffice. The Act itself, in Section 13, 29 U. S. C. A. 213, excluded certain employments, as agriculture, catching fish, seamen, switchboard operators in a small telephone exchange, but did not say what proportion of the employee's time and effort must be given to the excluded activity to effect an exclusion. In only one case was attention given to a possible mixed employment, in excluding 'any employee engaged in any retail or service establishment *the greater part* of whose service and selling is in intrastate commerce'. Section 13(a)(2). *Preponderance* is here made the test as between service in interstate and in intrastate commerce. It is a logical and reasonable test, and would afford a fair test in all mixed employments. This court, however, in *Fleming, Admr.* vs. *Jacksonville Paper Co.*, 128 Fed. (2) 395, suggested that if 'a substantial part' of the employee's mixed work was in interstate commerce it was enough. That language was repeated by the Supreme Court on review of the case, 317 U. S. 564. That may be said to be the judicial formula. After the decision of *Kirschbaum Co.* vs. *Walling*, 316 U. S. 517, which applied the Act to the maintenance employees of the owner of a building whose tenant was using it wholly for the production of goods for commerce, the Administrator was confronted with the case of a building only partly used for such production. He applied the judicial formula of 'substantial part', and by a rule published Oct. 17, 1942, directed that 20% should be considered substantial. When he had a case of mixed employment by trolley and bus carriers, exempt under Sect. 13(a)(9), he on March

6, 1944, applied the same ratio of 20%. We therefore have the legislative suggestion of preponderance, the judicial formula of substantial part, and the administrative crystallization of 20% to choose between. But no choice need be made, because the fact-findings are that the admixture of interstate commerce done was not 'extensive', nor even 'substantial', and certainly nowhere near 20%. The district judge called it a 'flow', but the evidence shows it to be a mere trickle, and (except for the mail) seasonal and intermittent. None is proved with certainty."

The answer to the foregoing question should be authoritatively given, there being now a conflict in the applicable decisions of the Circuit Courts of Appeal, even in the decisions of the Circuit Court of Appeals for the Fifth Circuit itself. In the case at bar a very slight admixture of interstate commerce has been held sufficient to make workers "engaged in commerce" under the Act, whereas in *Fleming* vs. *Jacksonville Paper Co.*, 128 F. (2d) 395 it was held that a substantial part of his mixed work had to be in commerce before there could be coverage.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict of applicable decisions of this court.

The decision of the case at bar is probably in conflict with the holdings of this Court in *Walling* vs. *Jacksonville Paper Co.*, 317 U. S. 564 and *Overstreet* vs. *The North Shore Corporation*, 318 U. S. 125. In the Jacksonville Paper Co. case, concerning mixed employment wherein the employee worked both on interstate and intrastate commerce, this Court held:

"If a substantial part of an employee's activities related to goods whose movements in the channels of

> interstate commerce was established . . . he is covered by the Act."

In the Overstreet case this Court held:

> "The allegations of petitioners' complaint satisfy this practical test. The road and bridge allegedly afford passage to an extensive movement of goods and persons between Florida and other states . . ."

It is now determined by the Circuit Court of Appeals for the Fifth Circuit that:

> "We do not find, however, that the Court rested its holding upon the alleged extensive use; we think a careful reading of the opinion justifies the view that the holding is based upon the *fact* of interstate use rather than upon the extent of such use." (Italics ours)

This holding is described by Judge Sibley in the following language:

> "The theory advanced is that because the road was open for general commerce it became an 'instrumentality of interstate commerce' so soon as any interstate commerce was done and continued to be such so long as it was kept open, so that everyone employed about it was at all times 'engaged in interstate commerce'."

If the mere fact, that interstate use is once made of a commercial facility or instrumentality, brings about a situation in law under which everyone thereafter employed about it is 'engaged in interstate commerce', that doctrine should be authoritatively announced by this Court and not left in its present state of uncertainty.

Furthermore the decision of the case at bar is in conflict with the administrative determination that the standard of coverage is determined by the single work-week and that a workman, by reason of the character of his duties,

may be within the coverage of the Act one week, and not the next. Although the Act regulates weekly hours and weekly wages, indicating a belief on the part of Congress that they were dealing with employees whose permanent occupation was in interstate commerce, it fails to specify the amount of commerce in which an employee must be engaged in order to be covered, except in connection with the exemption wherein, as Judge Sibley points out, the words "greater part" are used. This is a question which will come up again and again in the administration of the Act and must ultimately be decided by the Supreme Court, if it has not done so in the Jacksonville Paper Co. case.

It follows from the opinion below and from the record that there might be weeks during which not a single movement of goods in commerce nor a single interstate transit took place over the road and, therefore, in such weeks there was no interstate commerce of which the employees could have been a part by virtue of the nature of their duties. Yet note the language of Judge Sibley (R. 360-361):

> "For not one of the work-weeks for which each (toll taker) claims and is awarded overtime pay and penalties is it proven that he in fact handled a single car travelling interstate, yet his right depends absolutely on his proving for each work-week that he was engaged in interstate commerce. All one can spell out of the evidence is that he might have been in some of the weeks so engaged to a slight extent. It seems to me that his recovery has no certain basis other than that he *saw* the postman pass by every day." (Bracket and Italics ours)

The emphasis on the word "saw" results from the fact that the toll taker collected no toll from the postman, who passed over the road toll free.

Closely related to the single work-week standard and

tacitly approving thereof are this Court's decision in *Walling* vs. *A. H. Belo Corp.*, 316 U. S. 624 and *Overnight Co.* vs. *Missel*, 316 U. S. 572.

WHEREFORE petitioner prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and send to this Court, on a day to be designated, a full and complete transcript of record and proceedings in said Circuit Court of Appeals had in this cause to the end that this cause may be reviewed and determined by this Court; that the Judgment of the Circuit Court of Appeals be reversed and that Petitioner be granted such other and further relief as may seem proper.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

As hereinbefore pointed out this case has previously been before this Court on the sufficiency of the pleadings. We here refer to all previous decisions in the case. The first opinion of the District Court, on the pleadings, is reported at 43 F. Supp. 445. The first opinion of the Circuit Court of Appeals, also on the pleadings, is reported at 128 F. (2d) 450. The previous decision of this Court in this case, on the pleadings, is reported at 318 U. S. 125. The opinion of the District Court, on the merits, here sought to be reviewed, is reported at 52 F. Supp. 503 (R. 321-335). The opinion of the Circuit Court of Appeals for the Fifth Circuit, on the merits, is reported at 143 F. (2d) .... (R. 351-361).

JURISDICTION

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered June 9, 1944 (R. 361) and on July 11, 1944 the Court denied Petition for Rehearing, without opinion (R. 369). The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 347 (a).

STATEMENT OF THE CASE

The history of the litigation and a condensed statement of the facts is set forth in the petition to which this brief is annexed. That statement is here amplified by way of giving some calculations intended to demonstrate the paucity of interstate commerce of which the work of the employees herein is a part, because so closely related thereto, as heretofore determined in this cause by this Court.

It is claimed by the respondents that the use of the toll road by four classifications of commerce brings them within the coverage of the Fair Labor Standards Act, and makes them "engaged in commerce", because they are, in law, to be considered a part thereof. Those four classifications are:

1. Movement of goods in commerce over the road.
2. Transits of persons to the "exclusive" clubs on Fort George Island.
3. Transits of patrons of the fishing camps.
4. Transits of the mail carrier operating the star route from Jacksonville to Fort George Island.

These will be discussed in order:

1. Movement of goods in commerce over the road: The Court has made a specific finding of fact covering this type of use:

> ". . . the total of all such movements was not in excess of 14 in the period from 1938 to 1942, inclusive." (R. 327)

2. Transits of persons to the "exclusive" clubs on Fort George Island: The District Court made a specific finding which fixes a maximum in this connection. In the record (R. 326) is found a tabulation containing all the evidence, giving the *total* out-of-Florida patronage at the "exclusive" clubs as follows:

Ft. George Club	1938-1939	45
	1939-1940	42
	1940-1941	59
	1941-1942	14
	1942-1943	9
Ribault Club	1941-1942	88

In this connection it is important to realize that all tabulations made by Petitioner give respondents the benefit of

each of these attendances as being a separate transit of an individual over the road, interstate in character, whereas at the same record reference it affirmatively appears that many patrons of the clubs came to them over the Inland Waterway by yacht. The record will bear out the statement that the respondents are not entitled to the benefit so given them and that the number of interstate transits over the road to the clubs is fewer than those herein calculated.

3. Transits of patrons of the fishing camps: As to these transits the District Court made no specific finding, but they can be dug out of the record. Every person renting rooms or cabins to fishermen in the area served by the toll road testified and the following maximum annual transits were thereby established:—Mrs. Chapman, 3 (R. 246); Mr. McKenna, 15 to 20 (R. 149); Mrs. Pender, 1 (R. 232); Mrs. Penland, 2 (R. 248); Mr. Overall, 3 (R. 259). Taking Mr. McKenna's maximum this gives a total of 29.

4. Transits of the mail carrier operating the star route from Jacksonville to Fort George Island: It appears from the record that the carrier of the United States mail delivers and collects letter mail and parcels to and from persons residing along the road each day, except Sunday, traversing the road once in each direction each such day. The majority opinion in the Circuit Court of Appeals does not even mention the mail carrier. The dissenting opinion points out that this was not interstate commerce in the constitutional sense, but the exercise of a governmental function under the postoffice and postroads clause of the Constitution and that there is no proof that any of the mail was interstate in fact, though counsel said some probably was (R. 359 and 92).

If the mail is to be excluded from consideration in determining coverage in this case, as it is respectfully submitted

that it should be, we have the following results for the years given:

Year	Total Traffic	Interstate Traffic	Percentage of Interstate Traffic
1940	43,423	131	0.302-%
1941	56,384	131	0.233-%
1942	41,381	131	0.317-%

In the foregoing tabulation it is to be emphasized, by repetition, that the total of 131 transits gives the respondents the advantage of every maximum figure—using 102 as the number of transits to the exclusive clubs and 20 as the number of transits to McKenna's Camp.

If the transits of the mail are calculated as interstate transits, we have the following results:

Year	Total Traffic	Interstate Traffic	Percentage of Interstate Traffic
1940	43,423	444	1.023-%
1941	56,384	444	0.788-%
1942	41,381	444	1.073-%

The figures above are arrived at by the addition of 313 transits of the mail each year to the generous figure of 131 contained in the preceding tabulation.

Both tabulations are based upon an averaging of the traffic over the whole year, although the traffic was in fact seasonal, the fishermen coming at one season and the club members at another.

The above figures mean these things (using the highest figures, including the passage of the mails):

(a) Volume of traffic: Over the period of three years, the average weekly traffic over the road was a fraction of

a car less than 130 motor vehicles. On this basis, including passages of the mail carrier there were 8.8 interstate transits per week. Since the toll collectors did not handle the transits of the mail carrier, there were 2.5 interstate transits per week, which were handled by them, to which they were "so closely related as to be a part thereof".

(b) Value of traffic: As shown by the document in evidence at R. 317, the average revenue per transit over the road was 54c. In calculating the value of the interstate traffic passing over the road, the respondents are not entitled to consideration of the trips of the postman, because he passed toll free (R. 29). Figured on this basis the daily value of the interstate traffic, giving the respondents the benefit of all doubts, would be 19.4c.

(c) Density of traffic—individuals: These figures are calculated on a twenty-four hour a day basis, it being observed from the record that the toll houses were operated twenty-four hours a day. The transits in (a) above being round trips, they have been multiplied by 2 to discover the hourly lapse of time between the interstate cars passing separate spots on the road, i.e., any given toll house. Including the postman's two daily passages, the interstate transits were 9 hours 48 minutes apart. Excluding the postman's passages, the interstate transits were 33 hours 30 minutes apart.

(d) Density of traffic—commerce in goods: Fourteen movements of goods passed over the road in five years. This would amount to 2-4/5ths movements of goods per year, or one movement less frequently than every four months.

(e) Time of employees consumed by interstate traffic: There is no way of arriving at a computation of this time in the case of the road maintenance crew whose activities were of a typical and inextricably mixed character. How-

ever, in an average work-week, the toll collectors would handle less than three interstate transits of individuals. Assuming that each individual moved in a separate car and had to stop at a toll house and pay toll (an extremely unlikely assumption since the majority travelled by club station wagon), allowing five minutes to each car (an overgenerous allowance), the toll takers would spend fifteen minutes "in commerce" each week.

In addition to the foregoing types of transits over the toll road there was a cleavage between witnesses for the Petitioner, on the one hand, and for the respondents, on the other hand, over the question what percentage of the motor vehicles travelling over the toll road bore out-of-Florida licenses. Petitioner's witnesses testified that from 5% to 8% of the cars bore such licenses; respondents' witnesses placed the percentage at from 20% to 33 1/3% (R. 353). The Trial Court found, with specific reference to this particular question that the "evidence . . . is extremely unsatisfactory" (R. 327). The Trial Court denied plaintiff's Motion to Strike out all evidence concerning foreign license traffic over the highway as distinguished from interstate traffic, which motion was on the ground that the mere fact that a car bearing an out-of-Florida license may have proceeded over the road was no evidence that that car was engaged in interstate commerce (R. 74-75).

SPECIFICATION OF ERRORS

The Petitioner specifies that it relies upon the following errors for a reversal of the judgment, to review which certiorari is sought:

1. The Court erred in affirming the action of the Trial Court, which overruled and denied respondent's Motion

to Strike out the evidence concerning the passage over the toll road of cars bearing out-of-Florida licenses.

2. The Court erred in affirming the action of the Trial Court in granting judgment for the respondents upon the complaint and evidence before it.

ARGUMENT

The questions presented by the Petition for Writ of Certiorari herein break down into the statement of the following propositions:

1. Employees engaged in the operation and maintenance of a toll road, over which there was no substantial amount of interstate commerce, could not, by virtue of such employment, be "engaged in commerce" within the meaning of the Fair Labor Standards Act.

2. Employees engaged in the operation and maintenance of a toll road over which interstate commerce moved, having a daily traffic value of less than twenty cents, the handling of which consumed less than fifteen minutes per week time of the employees, are "engaged in commerce" to an inconsequential extent and such engagement is within the doctrine *de minimis non curat lex,* so that such employees could not, by virtue of such employment, be "engaged in commerce" within the meaning of the Fair Labor Standards Act.

3. Congress is without power under the constitutional authority "to regulate commerce among the several states", solely because once some interstate traffic passed over a road and the State law required that it "be open for traffic at any and all times", to regulate the method of operation, including the fixing of minimum wages and maximum hours of employment for maintenance and oper-

ational employees, of a dead end country toll road lying wholly within one county of a State.

This cause should be determined under either the first or the second question above presented, as a matter of statutory construction. However, the doctrine announced by the Circuit Court of Appeals goes so far afield as to place upon the Fair Labor Standards Act a construction which, if correct, would seem to render the Act unconstitutional as being an attempted exercise of power, beyond the regulation of commerce between the states, invading a matter of purely local concern and which should be left to the local authorities.

The above propositions will be discussed seriatim.

1. Employees engaged in the operation and maintenance of a toll road, over which there was no substantial amount of interstate commerce, could not, by virtue of such employment, be "engaged in commerce" within the meaning of the Fair Labor Standards Act.

It has been determined by this Court in this cause that the employees engaged in the maintenance and operation of the toll road here involved are "so intimately related to (the) interstate commerce (passing over the road) 'as to be in practice and in legal contemplation a part of it' (Pedersen's case. . . .)". *Overstreet* vs. *North Shore Corp.*, 318 U. S. 125, 130. There is no intention nor desire, at this time, to attempt to disturb this holding, which has become the law of the case and the law of the land and, in the matter of statutory construction involved, the employees must be considered to have been a part of such interstate commerce as did flow over the toll road. Was that commerce enough, that they must be held, on the facts established in evidence, to have been "engaged in commerce"? This question could not have arisen in the Pedersen case

because the volume of traffic never came up and could not have come up in the Employer's Liability cases, for the reason that all the railroads in the country, as this Court undoubtedly judicially knows, handle a substantial amount of interstate commerce, whether they be short lines or trunk lines (see *Walling* vs. *Rockton & Rion RR.*, infra).

In the decision of the Overstreet case, at 318 U. S. 127, it was said:

> "It (the toll road) is used extensively by persons and vehicles travelling between the Island and points outside Florida in interstate commerce." (Bracket ours)

This was said by way of summary of the allegations of the complaint as amended, "taken as true for purposes of the motion to dismiss".

In the text of the opinion it was said (318 U. S. 130):

> "The allegations of petitioners' complaint satisfy this practical test (applied under the Federal Employer's Liability Act). The road and bridge allegedly afford passage to an extensive movement of goods and persons between Florida and other states . . ." (Bracket ours)

According to the Petition for Certiorari (p. 5) filed in the Overstreet case by some of the respondents here, as petitioners in their case, the important question presented and necessary to be determined by this Court was:

> "Does not the protection of the Fair Labor Standards Act of 1938 extend to the following classes of employees of a corporation operating a toll road *extensively used as a highway for conveyance of passengers and goods* in interstate commerce?" (Italics ours)

In the statement of "reasons relied upon for allowance of writ" in the same petition (p. 6) appears the following:

> ". . . the case turns upon an important question of federal law . . . :
>
> "Whether the Fair Labor Standards Act extends coverage to persons employed to maintain and repair roads and highway bridges *extensively used in the interstate transportation of passengers and freight . . .*" (Italics ours)

In their brief in the previous case (p. 3) respondents, as petitioners, summarized their complaint as alleging:

> "The road is *extensively* used by vehicular traffic from points outside Florida to points on the toll road and beyond, and vice versa, and is an integral part of the highway system of the United States." (Italics ours)

The Administrator of the Wage and Hour Division filed a brief on the merits in the previous case in which, on page 4, he summarized the allegations of the complaint, using the following language:

> "The toll road . . . is used *extensively* by persons and vehicles travelling between the island and points outside Florida in interstate commerce." (Italics ours)

In the brief of the petitioner, who was respondent in the previous case, on the merits, (pages 2 and 3) appears the following:

> "In accepting the facts stated in the complaint with respect to the amount of interstate as distinguished from intrastate traffic passing over the road, we reserve the right to dispute those facts in the event that a trial in this case on the merits should be necessary, and also to argue that the amount of interstate traffic over the road comes within the *de minimis* principle or in any event is less than 20% of the entire traffic."

We think it reasonably plain that, if an *extensive* amount of interstate commerce passed over this toll road, it could

be regarded as an *essential* instrumentality of commerce. By the same token, if the interstate traffic over it is virtually nil, there is no possible argument which could be made to establish the toll road as "essential."

At page 4 of the supplemental memorandum filed by the Administrator of the Wage and Hour Division on the merits on the previous appearance of this case in this court, it was contended that the following language in Interpretative Bulletin No. 5 issued in November, 1939, by the Wage and Hour Division, constituted a "contemporaneous construction of (the) statute" entitled to "judicial affirmation":

> "Employees of contractors engaged in maintaining, repairing or reconstructing . . . highways, bridges or other essential instrumentalities of interstate . . . commerce would seem to be engaged in interstate commerce and subject to the Act. . . ."

In this Court's opinion (318 U. S. 129), the foregoing interpretative language was referred to in a footnote, indicating the persuasive effect thereof on this court.

In view of all the foregoing, it appears that this case was decided previously on the theory that there was an "extensive" movement of interstate commerce over the toll road, and that the toll road was an "essential" instrumentality of commerce.

The facts being in, the case before the Court is a far cry from that thought to have been before the Court on the previous appearance of the case.

Of the fourteen movements of goods in commerce, ten were movements of horses from Georgia to a dude ranch on Dames Point which moved over the toll road from Toll House No. 1 to Toll House No. 2, but which could have reached Dames Point by County Road, as is revealed by the map of the road which was in evidence and which is

transmitted to this court separately. For convenience, a map is appended* hereto which will reveal the route which could have been followed in moving these horses. The facts in this regard appear in the record at page 94, et seq. It will be noted that the witness "shipped six or eight" horses and "carried one horse", a total not of nine trips, but "from eight to ten". The number has been counted as ten. The other four movements in five years are made up of "two or three shipments of novelties from Chicago" to Rainbow Camp or Camp Overall, (counted as three rather than as two in the determination that there were fourteen movements of goods over the road) as established at R. 260, and "on one occasion . . . the . . . Brown Company had to have a cutter built . . . and it was built in Georgia . . . and brought down here on a truck; a cutter head for a dredge" (R. 135). It will be realized that the cutter head could have reached the dredge by boat. The only movements, therefore, of goods for which the toll road could have been "essential" were the "two or three" shipments of novelties to the Rainbow Camp over a period of five years.

Of the supposed conveyance of passengers or passage of persons interstate, over the toll road the evidence established the maximum of 131 individual transits in the best year, as hereinabove shown (pp. 16-18).

If the passage of the mails, toll free as it was (R. 29) is sufficient to bring the employees within the coverage of the Act, then, indeed, much has been established. The mails reach every most distant point. They come directly to many a farm house, crossing small bridges and traversing private lanes leading thereto en route. Does the farm hand who maintains the lane and bridge thereby "engage in commerce"? Hardly an office building in the land is with-

*Appendix A.

out its mail carrier who rides its elevators and traverses its halls, swept daily by the building maintenance crew. Do the charwomen and elevator operators thereby "engage in commerce"? The postman walks up many a citizen's walkway from sidewalk or street to his door. Does the yard man who trims the grass away from the walk, thereby facilitating the postman's passage, or the cement worker who patches a broken section of concrete in the walk thereby "engage in commerce"? Examples could be multiplied ad infinitum. The trouble is that, if coverage is to be based upon the passage of the mails, too much seems to have been proven and a minimum result must be the reversal of the office building cases in numerous of which certiorari has been denied. To name several:

Johnson vs. *Dallas Downtown Development Co.*, 132 F. (2d) 287; certiorari denied; 318 U. S. 790;

Johnson vs. *Masonic Building Co.*, 138 F. (2d) 817; certiorari denied, ... U. S. .... (Feb. 28, 1944);

Rucker vs. *First National Bank of Miami, Oklahoma*, 138 F. (2d) 699; certiorari denied, ... U. S. .... (Jan. 31, 1944);

Convey vs. *Omaha National Bank*, 140 F. (2d) 640, certiorari denied, ... U. S. .... (Mar. 6, 1944).

There are other cases unnecessary to be cited.

To supplement the foregoing there is nothing other than the "extremely unsatisfactory" evidence concerning passage of cars with out-of-Florida licenses over the toll road and the evidence concerning the passage of the postman.

As pointed out above (pp. 20-21) these interstate movements could not consume fifteen minutes time per week of

the toll takers, represented an income to petitioner not worth mentioning and, in short, draws a good picture of an interstate will-o-the-wisp. There is nothing substantial about it; it hardly reaches a quantity which would be entitled to the appellation *de minimis,* and, contrarywise, is ephemeral to the nth degree. Yet it is upon this interstate traffic, and by reason of it, and upon the holding that the duties of the employees, who do not actually come in contact with or in any way participate in the traffic, are so closely related thereto as "in legal contemplation" as to be a part thereof, that coverage has been found to exist in this case.

In addition to what this court held in this case when it was previously here, viz: that there is coverage where there is an extensive amount of interstate commerce involved; this court has also dealt with the quantity of commerce necessary to be involved for there to be coverage under the Act, within the term "engaged in commerce", in *Walling* vs. *Jacksonville Paper Co.,* 317 U. S. 564, where it was said:

> "The fact that all of respondent's business is not shown to have an interstate character is not important. The applicability of the Act is dependent upon the character of the employees' work. *A. B. Kirshbaum Co.* vs. *Walling,* supra. If a substantial part of an employee's activities related to goods whose movement in the channels in interstate commerce was established by the test we have described, he is covered by the Act. Here as in other situations *(A. B. Kirshbaum Co.* vs. *Walling,* supra) the question of the Act's coverage depends upon the special facts pertaining to the particular business."

While in the case at bar neither the District Court nor the majority of the Circuit Court of Appeals thought that it mattered whether or not the employees' activities related to a substantial amount of interstate commerce, neither the Administrator nor other courts, since the above holding in

the Jacksonville Paper Co. case, have been of the same opinion.

The Administrator, on November 19, 1943, with respect to maintenance employees in buildings in which less than 20% of the space was occupied by firms engaged there or elsewhere in the production of goods for commerce, determined that he would take no further enforcement action under the Wage and Hour Provisions of the Act.[1]

Concerning the application of the exemption of employees of local trolley and bus carriers (Act—Sec. 13 (a) (9)), where such employees were also engaged in other non-exempt interstate activities, the administrator held that if the employee engaged in non-exempt work for more than 20% of the number of hours he worked during a work-week, he would not be exempt.[2]

The Courts, in the following, and in many other cases, have looked to the amount of commerce in which the employees were engaged or to which their duties related to see whether the amount thereof was substantial:

Walling vs. *Mutual Wholesale Food & Supply Co.*, 141 F. (2d) 331;
Schwarz vs. *Witwer Grocer Co.*, 141 F. (2d) 341;
Walling vs. *Rockton & Rion R. R.*, 54 F. Supp. 342;
Fellabaum vs. *Swift & Co.*, 54 F. Supp. 353;
Rouch vs. *Continental Oil Co.*, 55 F. Supp. 315;
Hinkle vs. *Frank Nelson Building Inc.*, ... Ala. ...., 18 So. (2d) 374;

The case last mentioned is direct support for every point made by the petitioner in the presentation of its case.

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[1]PR 19 (Rev.) Wage and Hour Division Release. (See Appendix C)
[2]Administrator's Opinion of March 6, 1944. (See Appendix C)

Based upon the foregoing argument it is respectfully submitted that the correct rule for the determination of coverage under the Act is that, for an employee to be "engaged in commerce" within the meaning of the Fair Labor Standards Act, it must appear that in any given work-week his duties related to a substantial amount of such commerce.

Pointed up by the presentation of this matter, as well as by the record, is the fact that the application of the decision of the Court below will entirely ignore the construction of the Act and its application to employees by work-weeks, that is to say, the fact that it is applicable both in the minimum wage and maximum hour provisions according as to whether or not the employee is engaged in commerce during a given week. Under the decision below, though no interstate traffic may pass over the road in many weeks, yet if some commerce passed over the road at some time, thereafter, continuously, as long as the road remained open for any commerce which might come along, every employee working thereon was deemed engaged in commerce. This we submit is a perversion of the whole theory of the Act.

(a) Implicit also in the decision below, both in the District and Circuit Court of Appeals, is the theory that evidence that a car bearing a license from another state passes over a Florida road is evidence of interstate commerce over the Florida road. This ruling of the District Court was assigned as error on the appeal to the Circuit Court of Appeals (R. 338-339) and is assigned as error here (page 20 above). Judge Sibley, in his dissenting opinion, said:

> "That a car bore a foreign plate does not . . . prove that it was on an interstate trip over this road . . ." (R. 358-359).

Apart from this reference to the matter the particular point has received no attention whatever, although petitioner

conceives that, if the decision of the Trial Court should be affirmed, it is solely because of the receipt of this evidence concerning the passage over the road of cars bearing out-of-Florida licenses.

2. Employees engaged in the operation and maintenance of a toll road over which interstate commerce moved, having a daily traffic value of less than twenty cents, the handling of which consumed less than fifteen minutes per week time of the employees, are "engaged in commerce" to an inconsequential extent and such engagement is within the doctrine de minimis non curat lex, so that such employees are not "engaged in commerce" within the meaning of the Fair Labor Standards Act.

In the discussion of this point little need be added to what has been said under point 1 above.

We refer the court to *Goldberg* vs. *Worman,* 37 F. Supp. 778, and to *Tucker* vs. *Hitchcock,* 44 F. Supp. 874, which cases apply the doctrine in two different manners. We also refer the Court to the case of *McKeown* vs. *Southern California Freight Forwarders,* 52 F. Supp. 331 where the above, and other, cases are discussed. In the latter case the court held that a man whose employment was concerned and connected with interstate commerce to the extent of seven per cent of his total activities during each and every day of each and every week was entitled to the benefits of the Act. It does not necessarily follow that because only seven per cent of one's time is concerned with interstate commerce that his work in connection therewith is not substantial. In the case at bar, our percentages are much smaller and we point out only that the California judge who wrote the McKeown opinion seemed doubtful of the application of the law to the particular plaintiff whose case he was considering. We submit to the court that where only less than one minute out of each hour of a man's labor is devoted to or connected

with interstate commerce that it is not reasonable to hold that he is engaged in such commerce. There would be nothing "practical" about a decision which held that such a man was "engaged in" interstate commerce.

This Court has apparently recognized the doctrine *de minimis* in *National Labor Relations Board* vs. *Fainblatt*, 306 U. S. 601, 606. This Court also, in the Jacksonville Paper Co. case, supra, has said:

> "It is clear that the purpose of the Act was to extend Federal control in this field throughout the farthest reaches of the channels of interstate commerce."

This statement was repeated in the Overstreet case, supra. But also this Court, in the Jacksonville Paper Co. case, supra, said:

> "In this connection we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the States . . . Moreover as we stated in *Kirshbaum Co.* vs. *Walling*, supra, 522-523, Congress did not exercise in this Act the full scope of the commerce power."

Also this Court has said in the Kirshbaum Co. case that what is needed in the construction of this Act is a "common sense accommodation of judgment to kaleidoscopic situations." And further this Court has indicated its desire for the application of "practical" tests.

We believe and submit that a practical common sense deduction drawn from these statements is that they do not mean that every man is brought under the Wage and Hour Law at the moment of his contact with a single interstate shipment or movement. We believe it reasonably plain that Congress in the Act, and the Courts in construing the Act, sought to reach and protect those individuals and relationships who and which in a practical sense engaged in inter-

state commerce and not those whose part in interstate commerce was most trivial.

3. Congress is without power under the constitutional authority "to regulate commerce among the several states", solely because once some interstate traffic passed over a road and the State law required that it "be open for traffic at any and all times", to regulate the method of operation, including the fixing of minimum wages and maximum hours of employment for maintenance and operational employees, of a dead end country toll road lying wholly within one county of a State.

We do not here question the power of Congress to enact the Fair Labor Standards Act in the form in which it appears on the Statute Books. Until the opinion of the Circuit Court of Appeals in this case was rendered, petitioner did not conceive of the case as presenting or involving a constitutional problem. Upon rendition of the judgment, however, it appears that the Circuit Court of Appeals is of the view that because the toll road was open for general commerce, so soon as any interstate commerce passed over it, it became an instrumentality of interstate commerce, and continued to be such so long as it was kept open. This holding appears to be based upon the fact of interstate use, rather than upon the extent and continuity thereof. This conclusion appears to be arrived at by a construction of the Overstreet opinion which petitioner believes to be unjustified. Neither in the Overstreet case, nor in the Pedersen case[5], which this court followed in its opinion in this case, was the fact of continuity of use ignored. In this case the court relied upon the allegation of the complaint that the road carried an "exten-

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[5]*Pedersen* vs. *Del. Lack. & W. RR.* 229 U. S. 146.

sive" amount of interstate commerce—a word which certainly implies continuity of use by such commerce—and in the Pedersen case, the Court's holding shows that when the track or bridge *was used* in interstate commerce it was an instrumentality of commerce.

So construed, we deem the holding of the Court below to be that, whenever any movement of interstate commerce proceeds over any road, street, lane or walkway, thereafter, for so long as such road, street, lane or walkway remains open, anyone working thereon is "engaged in commerce", irrespective of the importance of the one movement and irrespective of whether there ever are any other movements of interstate commerce over the "instrumentality".

We need not deal with ancient and discarded phrases, used by the members of this Court of other days in differentiating between what was local and left to the states on the one hand, and that which affected interstate commerce and was therefore of National concern on the other hand, but consideration should be given to what has been said about such matters in decisions written by present members of this court.

Mr. Justice Frankfurter wrote on the subject and considered it in connection with the construction of the Federal Trade Commission Act in *Federal Trade Commission* vs. *Bunte Bros.*, 312 U. S. 349, where the Court's decision recognized that the construction of the Federal Trade Commission Act contended for was:

> "An inroad upon local conditions and local standards of such far-reaching import (that it) ought to await a clearer mandate from Congress." (Bracket ours)

The matter was touched upon from its constitutional angle in *Wickard* vs. *Filburn*, 317 U. S. 111 (opinion by Mr.

Justice Jackson), and in *A. B. Kirshbaum Co.* vs. *Walling,* 316 U. S. 517 (opinion by Mr. Justice Frankfurter).

In *Wickard* vs. *Filburn,* supra, the rule governing what might and what might not be done was brought down to date after extensive discussion, in the following extract (317 U. S. 125):

> "But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts *a substantial economic effect on interstate commerce. . .*" (Italics ours)

In *Kirshbaum* vs. *Walling,* it was said (316 U. S. 525):

> " 'Necessary' is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority. We cannot, in construing the word 'necessary', escape an inquiry into the relationship of the particular employees to the production of goods for commerce. If the work of the employees has only the most tenuous relation to, and is not in any fitting sense 'necessary' to, the production, it is immaterial that their activities would be substantially the same if the employees worked directly for the producers of goods for commerce."

In the Jacksonville Paper Co. case, as above pointed out, this Court expressly said of this particular Act:

> ". . . we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states . . ."

From the foregoing, particularly from Judge Jackson's opinion in *Wickard* vs. *Filburn,* supra, we deduce that the field of regulation of interstate commerce is not all inclusive and does not follow one through one's front door when he returns from an interstate journey, so that the

workman repairing the door is thereby engaged in commerce in any such sense as that Congress may control the relationship between him and the home owner. The line bounding not only coverage under the Act, but power under the Constitution is drawn somewhere, and its location must be determined. The necessity for drawing it appears from the case at bar in the broad construction placed upon the Fair Labor Standards Act by the Circuit Court of Appeals.

We submit that the operation and maintenance of the toll road involved in this case has on the record no substantial economic effect upon commerce, is not, in and of itself, commerce, and is touched upon by commerce to so light an extent as that its essentially local character is not disturbed or nationalized. We submit that until a closer connection with commerce than that shown by the record is established that it is beyond the power of the Congress under the commerce clause to regulate the operation of this toll road, which regulation would be constituted by the application to the relationship between Petitioner and respondents of the Fair Labor Standards Act.

SUMMARY AND CONCLUSION

To summarize our main contention:—

In the Overstreet case the complaint alleged that the toll road constituted an "integral part of the highway system of the United States", and further that it was "used extensively by persons and vehicles travelling between the island and points outside Florida in interstate commerce." The allegations of the complaint were assumed for the purpose of the motion to dismiss. Upon the trial it developed that the road was not an integral part of the highway system of the United States but was a lightly travelled,

dead-end road leading from U. S. Route 17 to Fort George Island, and that the interstate movement of persons and vehicles over it was less than 1%. The question presented is whether the toll road company's employees (other than those engaged in the operation of the drawbridges over navigable streams) are engaged in interstate commerce.

It appears from the opinion (318 U. S. 130) that this Court rested its conclusion upon the "extensive movement of goods and persons between Florida and other states", permitting the implication that if the movement of goods and persons between Florida and other states is insignificant and casual a different result would follow.

Under the construction given by the court below any person working on a private road within the United States would come within the coverage of the Act regardless of the extent of its use in interstate commerce. The emphasis placed by this Court upon the word "extensive" indicates that the character of the commerce is determined by the degree of use. That the degree of use affords a practical test is illustrated by the fact that the Administrator determined that 20% was the critical point when an activity is or is not in interstate commerce.

On the basis of the three points made on page 21, above, and hereinabove discussed, we respectfully submit that this court should review the decision of the Circuit Court of Appeals and reverse same.

Respectfully submitted,

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APPENDIX A

ATLANTIC OCEAN
Fort George Island
Intracoastal Waterway
Sister's Cr.
Clapboard Cr.
Brown's Cr.
St. John's River
San Carlos C.
Dunn's Cr.
NEW BERLIN
DAMES POINT RD.
EASTPORT
Cedar Cr. or Broward River
AIR PORT
HECKSCHER DRIVE
River
MAIN ST.
JACKSONVILLE
MAYPORT
Intracoastal Wa
HECKSCHER DRIVE
DUVAL COUNTY, FLORIDA

APPENDIX B

Excerpts from Fair Labor Standards Act of 1938, 52 Stat. 1060, U. S. Code, Title 29, Secs. 201-219.

Sec. 3. As used in this Act—

. . . . .

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

. . . . .

Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

. . . . .

Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 13 (a) The provisions of sections 6 and 7 shall not apply with respect to

. . . . .

(9) any employee of a street, suburban, or interurban electric railway, or local trolley or motor bus carrier, not included in other exemptions contained in this section; or

. . . . .

(11) any switchboard operator employed in a public telephone exchange which has less than five hundred stations. (Paragraph (11) added by Act of August 9, 1939, Pub. No. 344, 76th Congress.)

APPENDIX C

Excerpts from Interpretative Bulletins and Releases Under the Fair Labor Standards Act of the United States Department of Labor, Wage and Hour Division.

Excerpts from Interpretative Bulletin No. 3:

"3. The 40-hour standard in Section 7 (a) is a limitation upon the number of hours that may be worked *in any workweek* free of time and one-half overtime compensation. A workweek consists of seven consecutive days. It need not coincide with the calendar week but may begin on any day and at any time of any day. The beginning of the workweek may be changed if the change is intended to be permanent and not to evade the overtime requirements of the Act."

. . . . .

"5. The Act takes a single workweek as its standard and permits no averaging of hours over two or more weeks . . ."

Excerpts from Interpretative Bulletin No. 5:

"9. . . . .

". . . . . there is no justification for determining the applicability of the Act to a particular employee on the basis of the percentage of the goods he produces . . . which move in interstate commerce. However, this does not necessarily mean that an employee who at some particular time may engage in work which brings him within the coverage of the act is, by reason of that fact, thereafter indefinitely entitled to the benefits of the statute. In determining the applicability of the act, the workweek is to be taken as the standard. Thus, if in any workweek an employee produces goods for commerce and also produces goods for local con-

sumption or performs work otherwise outside the coverage of the act, the employee is entitled to both the wage and hour benefits of the act for all the time worked during that week. The proportion of the employee's time spent in each type of work is not material.* An employee spending any part of a workweek producing goods for commerce will be considered on exactly the same basis as an employee engaged exclusively in producing goods for commerce during the workweek and the total number of hours which the employee works during the workweek at both types of work must be compensated for in accordance with the minimum wage and maximum hour standards of the act.

"It is thus recognized that an employee may be subject to the act one week and not the next. It is likewise true that some employees of an employer may be subject to the act and others not. . . ."

Excerpt from PR 19, issued November 19, 1943:

". . . he (the Administrator) would take no further enforcement action under the wage and hour provisions of the Fair Labor Standards Act, with respect to maintenance employees in buildings in which less than 20 per cent of the space is occupied by firms engaged there or elsewhere in the production of goods for commerce. He also stated that, in the interests of simplicity and uniformity in the application of this policy, for the present he would not include in the computation of the 20 percent banking firms or other firms whose interstate activities are limited to the preparation and transmission of documents, communications or correspondence, although in his opinion such activities involve production of goods for commerce as defined in the Fair Labor Standards Act and of course involve engaging in commerce." (Bracket ours)

*But see additional quotations, infra this appendix.

Excerpt from Administrator's Opinion of March 6, 1944:

"The Administrator pointed out that there are certain firms or individuals who engage in transportation which falls within the criteria outlined above and are likewise engaged in other activities which are not of an exempt nature. In such situations the exemption is applicable to those employees who are exclusively engaged in the type of work which was intended to be exempt, i.e., transportation by the means described in the exemption or activities so closely related to those described in the exemption as to be actually a part thereof. However, where a particular employee performs exempt and non-exempt work, it is the Administrator's opinion that such an employee who is engaged in work of a non-exempt nature for more than 20 percent of the number of hours he works during a workweek would not be exempt for that workweek under Section 13(a) (9). In those cases where the portion of time an employee spends in non-exempt work cannot be definitely ascertained, the exemption likewise is inapplicable. The 20 percent test adopted by the Administrator is in accord with similar tests prescribed in other regulations issued by the Division, which tests have generally been accepted by the courts."